

On February 5, 1995 appellant, then a 31-year-old parcel sorting machine clerk, filed a traumatic injury claim alleging that on February 3, 1995 he sustained a lumbar strain while

performing his work duties. On August 23, 1996 the Office accepted his claim for a herniated disc at L4-5 and authorized surgery which was performed on August 22, 1996 by Dr. Augusto G. Asinas, an attending neurosurgeon. Appellant returned to limited-duty work on October 14, 1998. By letter dated June 7, 1999, the Office accepted that he sustained a recurrence of disability on January 2, 1999. Appellant underwent lumbar surgery on January 13, 2000. The Office paid compensation for temporary total disability.

On February 8, 2003, February 10, 2004, February 10 and October 11, 2005 appellant completed and signed EN1032 forms reporting that he had no employment or self-employment during the past 15 months. On the October 11, 2005 Form EN1032 he stated that he volunteered as a softball umpire on an emergency basis. Appellant related that this work fell within his restrictions.

In a May 3, 2006 investigative report, Joel P. Barry, a special agent with the employing establishment's office of inspector general, determined that appellant umpired multiple softball games in 2004 and 2005. In this capacity, he was observed running, bending at the waist, squatting, throwing, and lifting for hours at a time. Special Agent Barry stated that Dr. Asinas was not aware that appellant was engaged in such activities. The evidence revealed that appellant umpired in 2004 and May and June 2005 and video surveillance tapes recorded him working as an umpire during softball games on July 29 and August 1 and 11, 2005 that each lasted approximately one hour. Appellant was observed running forwards and backwards, side-stepping, bending at the waist, lifting objects, squatting, throwing bats and balls, and catching balls with his bare hands. On August 2, 2005 he was observed driving his sport utility vehicle (SUV) to a liquor store. Appellant left the store carrying a case of beer with no apparent difficulty. He placed it in his vehicle, drove to a baseball field, and walked to the bleachers. Appellant sat on the bleachers for over two hours and watched softball games during which he tossed cans of beer to other spectators and players near the bleachers. On September 14, 2005 he was observed driving his SUV to a post office where he lifted a large package weighing 13.9 pounds out of the vehicle and carried it inside with no apparent difficulty. Special Agent Barry noted an accompanying narrative statement of Joseph F. Cuddy, Jr., a head umpire and scheduler of softball umpires for a sports association, and copies of checks indicated that appellant received earnings from his work as an umpire from 2004 through 2005. He further related that an accompanying letter from Dr. Asinas stated that appellant could return to light-duty work based on his review of the surveillance videotape. The accompanying copy of an April 10, 2006 interview of appellant contained his admission to umpiring softball games.

In a January 30, 2006 statement, Mr. Cuddy related that appellant started working as an umpire in 2004 and continued through 2005. His 2004 and 2005 umpire lists contained appellant's name and telephone number. Appellant was paid \$18.00 per game if two umpires worked together and \$36.00 per game if an umpire worked alone due to increased difficulty. Mr. Cuddy noted that umpires were paid cash for most games and only received checks for games that were forfeited or played on a military base. He stated that there were no checks payable to appellant in 2004. The checks payable to appellant revealed that he received \$86.00 on June 1, 2005, \$54.00 on July 4, 2005, \$121.00 on August 1, 2005 and \$28.00 on August 26, 2005.

In a February 9, 2006 letter, Dr. Asinas reviewed the surveillance video which demonstrated appellant's ability to run and umpiring baseball or softball games and was able to carry a package weighing approximately 14 pounds. He stated that, prior to watching the video, he was not aware of appellant's activities. Dr. Asinas opined that appellant was not totally disabled and could return to light-duty work.

On April 10, 2006 appellant stated that he did not make any money selling sporting products as he passed on the savings to his customers. He just wanted to get the company name out there. Appellant acknowledged that he umpired a tripleheader that lasted over three hours and was involved running, throwing and squatting was recorded on the surveillance video. He asked whether it was expected that he stay at home and get fat. In response to Dr. Asinas' lack of awareness of appellant's activities, appellant stated that he was permitted to go to a gym. He compared his umpire activities to squatting when using a toilet. Appellant stated that he made a minimal amount of money directing softball tournaments. The most he made for a tournament was approximately \$47.00. The most appellant made for all the tournaments he umpired in 2005 was approximately \$250.00.

On August 21, 2006 the employing establishment offered appellant a permanent limited-duty position. Appellant accepted the job offer and returned to work on September 2, 2006.

By decision dated March 8, 2007, the Office found that appellant had forfeited his entitlement to compensation for the period November 8, 2001 through October 11, 2005 based on his failure to report earnings while receiving compensation for total disability. Also, on March 8, 2007 it made a preliminary determination that he received an overpayment of compensation in the amount of \$149,630.64 during the stated period. The Office explained that it had evidence of cancelled checks which it had issued to appellant for that period totaling the said amount. It found that appellant was at fault in the creation of the overpayment. The Office found that he knowingly failed to report earnings. Appellant was advised that he could request a telephone conference, a final decision based on the written evidence only or a hearing within 30 days if he disagreed that the overpayment occurred, with the amount of the overpayment or if he believed that recovery of the overpayment should be waived. The Office requested that appellant complete an accompanying overpayment recovery questionnaire (Form OWCP-20) and submit financial documents within 30 days.

On March 29, 2007 appellant requested a preresoupment hearing. At the October 17, 2007 hearing, he testified that he was paid \$18.00 per game if he worked with another umpire and \$24.00 per game if he worked alone. Appellant further testified that, during the summer of 2004, he was paid approximately \$250.00 for working as a softball umpire. However, he lost money due to his expenses which included a registration fee, uniform, coats and cleats. In 2005 appellant was paid approximately \$400.00 for umpiring softball games. After paying a \$100.00 registration fee, he earned about \$300.00 which he reported on a Form EN1032. During the winter of 2004, appellant accepted an offer to work as a salesperson for a company that sold sports apparel and equipment. He sold these items out of his truck at softball tournaments held in Massachusetts, New Hampshire and Connecticut. Appellant was supposed to receive 30 percent from his sales but never made any money because he deducted 30 percent from the full price of the merchandise. He did not remember the amount of his total sales. Appellant stated that he did not make any profits from selling sports apparel and equipment from April to

September 2005. He did not report his earnings from working as an umpire or salesperson on the EN1032 forms he completed because he believed that he was to report any profits or sales commissions he received. Appellant did not consider the sales job as self-employment because he did not make any money. The hearing representative advised appellant to complete an OWCP-20 form within 30 days. Appellant did not respond within the allotted time period.

In a November 15, 2007 brief, appellant's attorney contended that appellant did not forfeit his compensation under the provision of section 8106(b) of the Federal Employees' Compensation Act because he did not knowingly fail to report his earnings. Counsel argued that he did not understand the purpose and intent of the questions regarding his work activities.

By decision dated January 28, 2008, an Office hearing representative modified the Office's overpayment determination to reflect that appellant received an overpayment in the amount of \$75,934.02 from November 10, 2003 to October 11, 2005.¹ He found that the February 10, 2005 EN1032 form covered the 15-month period beginning on November 10, 2003 and that the October 11, 2005 EN1032 form covered the 15-month period ending on that date. He directed appellant to repay the overpaid amount in full as he failed to submit a Form OWCP-20 as requested.²

LEGAL PRECEDENT -- ISSUE 1

Pursuant to 20 C.F.R. § 10.525, an employee who is receiving compensation for partial or total disability will periodically be required to submit a report of earnings from employment or self-employment, either part time or full time.³ Failure to report income may result in forfeiture of all benefits paid during the reporting period.⁴ The regulations further provide that, if an employee knowingly omits or understates earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required.⁵ Where the right to compensation is forfeited, the Office shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. § 8129.⁶

Section 8106(b) of the Federal Employees' Compensation Act provides that an employee who fails to make an affidavit or report when required or knowingly omits or understates any

¹ The worksheet of the recalculation of the overpayment revealed that from November 2 to 29, 2003 the Office paid appellant \$2,869.00 over a 28-day period or \$102.46 per day. During the period November 10 to 29, 2003 the Office paid appellant \$2,049.20 over a 20-day period. For the period November 30, 2003 to October 15, 2005 the Office paid appellant \$73,884.82. The total amount of compensation the Office paid to appellant for the period November 10, 2003 to October 15, 2005 was \$75,934.02.

² On appeal, appellant has submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

³ 20 C.F.R. § 10.525.

⁴ 5 U.S.C. § 8106(b); 20 C.F.R. § 10.525(b).

⁵ 20 C.F.R. § 10.529(a).

⁶ *Id.* at § 10.529(b).

part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required.⁷

It is not enough for the Office to merely establish that a claimant had employment or earnings. A claimant can only be subjected to the forfeiture provision of 5 U.S.C. § 8106(b)(2) if he knowingly failed to report employment or earnings.⁸ The term knowingly as defined in the Office's implementing regulations, means with knowledge, consciously, willfully or intentionally.⁹

The Office has the burden of proof to establish that appellant did, either with knowledge, consciously, willfully or intentionally, fail to report earnings from self-employment. To meet this burden of proof, it is required to closely examine appellant's activities and statements in reporting employment earnings.¹⁰ The Office may meet this burden by appellant's own subsequent admission to the Office that he failed to report employment or earnings which he knew he should report. It may meet this standard without an admission by appellant, if he failed to fully and truthfully complete the EN1032 forms and the circumstances of the case establish that he failed to fully and truthfully reveal the full extent of his employment activities and earnings. The Office may also meet this burden if it establishes through the totality of the factual circumstances that appellant's certification in the EN1032 form that he was not employed or self-employed, was false.¹¹

ANALYSIS -- ISSUE 1

In order to determine whether an overpayment of compensation occurred in this case, the Board must initially determine whether appellant forfeited his right to monetary compensation from November 10, 2003 to October 11, 2005.

On February 10 and October 11, 2005 appellant signed EN1032 forms, attesting that he was unemployed, had not engaged in any self-employment activities and had no earnings from November 10, 2003 through October 11, 2005. However, the record reflects that appellant failed to report his earnings as an umpire, director of tournaments and salesperson for the stated period. Appellant contended that he did not report his earnings on the EN1032 form because he did not have any profits from his employment or sales activities during the stated period. The Board notes that the EN1032 form specifically required appellant to report earnings from employment activities for which he received a salary, wages, income, sales commissions, piecework or payment of any kind even if operated at a loss. It is well established that the lack of profits from

⁷ 5 U.S.C. § 8106(b).

⁸ *Barbara L. Kanter*, 46 ECAB 165 (1994).

⁹ 20 C.F.R. § 10.5(n); see *Donald L. Overstreet*, 54 ECAB 678 (2003).

¹⁰ See *Michael D. Mathews*, 51 ECAB 247 (1999).

¹¹ See *Donald L. Overstreet*, *supra* note 9; see also *Terryl A. Geer*, 51 ECAB 168 (1999).

employment activities does not remove the employee's obligation to report earnings to the Office as required.¹²

The next issue to be resolved is whether appellant knowingly omitted or understated any part of his earnings for the period November 10, 2003 to October 11, 2005.¹³

Mr. Cuddy, a head umpire and scheduler of softball umpires, stated that appellant worked as an umpire from 2004 to 2005. Copies of his 2004 and 2005 umpire lists, contained appellant's name and telephone number. He related that an umpire was paid \$18.00 per game if two umpires worked together and \$36.00 per game if an umpire worked alone. Mr. Cuddy further related that umpires were paid cash for most games and only received checks for games that were forfeited or played on a military base. He stated that appellant did not receive any checks in 2004. Four checks payable to appellant reveal that he received \$86.00 on June 1, 2005, \$54.00 on July 4, 2005, \$121.00 on August 1, 2005 and \$28.00 on August 26, 2005. During an April 10, 2006 interview with employing establishment investigators, appellant admitted to working as a softball umpire for which he was paid \$47.00 and director for which he was paid approximately \$250.00.

Appellant acknowledged to investigators and testified at the prerecoupment hearing that he worked as an umpire, director of tournaments and salesperson beginning in 2004 through 2005. He contended that the most money he made as a director of softball tournaments was approximately \$47.00. For all the tournaments appellant directed in 2005, he made approximately \$250.00. As an umpire he earned approximately \$250.00 in 2004 and \$400.00 in 2005. Appellant contended that he actually earned less due to expenses associated with softball which included a registration fee, uniform, coats and cleats. He also contended that he did not receive a 30 percent sales commission because he discounted the products he sold by this amount for his customers. Appellant contended that he was not required to report these earnings because they were *de minimus*. The evidence, however, does not support his contentions. The above-noted checks and appellant's admission establish that he received at least \$586.00 in earnings as an umpire and a director. The Board finds that appellant's earnings were not *de minimus*.¹⁴ As appellant did not report the full extent of his earnings when he completed the February 10 and October 11, 2005 EN1032 forms, the Board finds that he knowingly understated his earnings.¹⁵ Accordingly, appellant forfeited his right to compensation during the period covered by the forms, November 10, 2003 to October 11, 2005, which created an overpayment of compensation in the amount of \$75,934.02.

¹² See *Melvin E. Gibbs*, 54 ECAB 473 (2003).

¹³ 5 U.S.C. § 8106(b)(2).

¹⁴ See *Albert A. Garcia*, 54 ECAB 206 (2002) (earnings of \$400.00 were not considered *de minimus* where appellant did not report the full extent of earnings when he completed Form EN1032). See also *Antonio J. Giunta*, 53 ECAB 370 (2002); *Barbara L. Kanter*, *supra* note 8.

¹⁵ *Roger Seay*, 39 ECAB 441, 445 (1988).

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Federal Employees' Compensation Act¹⁶ provides that an overpayment of compensation shall be recovered by the Office unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Federal Employees' Compensation Act or would be against equity and good conscience.¹⁷ Thus, the Office may not waive the overpayment of compensation unless appellant was without fault.¹⁸ Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.¹⁹

On the issue of fault, section 10.433 of the Office's regulations, provides that an individual will be found at fault if he or she has done any of the following:

“(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;

“(2) failed to provide information which he or she knew or should have known to be material; or

“(3) accepted a payment which he or she knew or should have known was incorrect.”²⁰

With respect to whether an individual is without fault, section 10.433(b) of the Office's regulations provides in relevant part:

“Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.”²¹

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in creating the overpayment. As noted, he knowingly failed to report earnings from self-employment to the Office resulting in a forfeiture for the period in question. Accurate earnings information is material to the question of appellant's entitlement to continuing wage-loss compensation. Because he made incorrect

¹⁶ 5 U.S.C. § 8129(b).

¹⁷ *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

¹⁸ *Norman F. Bligh*, 41 ECAB 230 (1989).

¹⁹ *Diana L. Booth*, 52 ECAB 370, 373 (2001); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

²⁰ 20 C.F.R. § 10.433(a).

²¹ *Id.* at § 10.433(b).

statements as to material facts which he knew or should have known to be incorrect, appellant is at fault in creating the overpayment and is not entitled to waiver.²²

With respect to the recovery of the overpayment in compensation, the Board's jurisdiction is limited to reviewing those cases where the Office seeks recovery from continuing compensation benefits under the Federal Employee' Compensation Act.²³ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.²⁴

CONCLUSION

The Board finds that appellant forfeited his entitlement to compensation from November 10, 2003 through October 11, 2005 because he knowingly failed to report earnings from his self-employment during this period, thereby, creating an overpayment in the amount of \$75,934.02. The Board further finds that the Office properly found that appellant was at fault in the creation of the overpayment, thereby, precluding waiver.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²² *Id.* at § 10.433(a).

²³ *Terry A. Keister*, 56 ECAB 559 (2005); *see also Cheryl Thomas*, 55 ECAB 610 (2004).

²⁴ *Cheryl Thomas*, *supra* note 23.